No. 2455

IN

The United States Circuit Court of Appeals

Ninth Circuit

N. COY
COMPLAINANT

VS.

THE
TITLE GUARANTEE & TRUST COMPANY, a Corporation; J. THORBURN ROSS, GEORGE H. HILL, et al
DEFENDANTS

MULTNOMAH COUNTY, OREGON, et al, Intervenors, Respondents
APPELLEES

R. S. HOWARD, Jr., Receiver of The Title Guarantee & Trust Company, Intervenor
APPELLANT

Brief of Appellant

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON

WALTER H. EVANS, District Attorney for the Fourth Judicial District,
MESSRS. EMMONS & WEBSTER, and
ROBERT F. MAGUIRE, Deputy Dist. Attorney,
For Appellees

WILLIAM C. BRISTOL,
For Appellant

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

No. 2455

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

MULTNOMAH COUNTY, et al.,
Intervenors, Respondents, Appellees,

vs.

R. S. HOWARD, JR.,
Receiver of The Title Guarantee & Trust Company,
Appellant,

In the main cause of

N. COY,
Complainant,

vs.

THE TITLE GUARANTEE & TRUST COMPANY, et al.,
Defendants.

Brief of Appellant

R. S. HOWARD, Jr., Receiver of The Title Guarantee & Trust Company, on Appeal from the Decision and Order of the District Court of the United States in and for District of Oregon

Rendered and entered the 23rd day of the month of April, in the year 1914, in the District Court of the United States for the District of Oregon, in said Intervention.

STATEMENT OF FACTS

(Rule 24, Sub. 2 (a.)

On the 6th day of November, 1907, by proceedings had in the then Circuit Court of the United States in and for the District of Oregon, now the District Court thereof, in a cause wherein N. Coy was complainant and The Title Guarantee & Trust Company and all of its officers and others defendants, the said court, on surrender by the defendants of all of the property and assets of The Title Guarantee & Trust Company, exercised its equity jurisdiction and took into its possession all of the property and assets of The Title Guarantee & Trust Company and appointed a receiver therefor pursuant to the bill and the consent and appearance of the defendants set forth in the record at pages 1 to 12.

On the 11th day of March, 1912, an intervention in said suit in the District Court of the United States was preferred by *"County of Multnomah, Oregon, and R. L. Stevens, Sheriff and ex officio Tax Collector for Multnomah County, Oregon,"* alleging and asserting among other things:

"That they have an interest in and a preferred claim and lien upon all of the property and funds in the possession and under the control of the receiver herein."

And further alleging:

"On the 6th day of November, 1907, a receiver was duly and regularly appointed by this court to take charge of all of the property, real, personal and mixed, of the above named The Title Guarantee & Trust Company and said receiver immediately thereafter duly quali-

fied and entered upon the discharge of his duties as such receiver and thereupon took possession of all of said property and ever since has been and still continues in the possession and charge of said property."

(See Record, pp. 13 and 14.)

Thereafter and on the 4th day of April, 1912, the receiver, the appellant herein, excepted to this petition of intervention for insufficiency and in connection with his exceptions made his answer as the same at large and more fully appears.

(Record, pp. 16 to 23.)

Thereafter and on the 8th day of May, 1913, another intervention was filed, as follows:

"Comes now the City of Portland, County of Multnomah and State of Oregon, by Walter H. Evans, District Attorney for the Fourth Judicial District of the State of Oregon, and represents to the above entitled Court and to its officers and agent the receiver of The Title Guarantee & Trust Company, that the said The Title Guarantee & Trust Company is indebted to the City of Portland, to the County of Multnomah and to the State of Oregon, on account of personal taxes as follows, to wit: (Here follows tabulated statement of taxes with penalties for the years 1908 to and inclusive of the year 1911)."

It will be observed (Record, pp. 24 and 25) that the difference between this petition and the petition filed by Messrs. Emmons & Webster, which was then pending, is that:

FIRST. The Evans petition claims for the year 1911;

SECOND. That no claim for the year 1911 was made in the Emmons & Webster petition;

THIRD. That the Evans petition is positively and unequivocally laid in the action *indebitatus assumpsit;*

FOURTH. While the Emmons & Webster petition directly claims *"an interest in and a preferred claim and lien upon all of the property and funds in the possession and under the control of the receiver,"* the Evans petition alleges debt.

FIFTH. Both petitions claim penalties and interest, but in different amounts.

The exhibits attached to the Evans petition (see Record, pp. 27 to 31), indicate the derivation of the tax.

The answer of the receiver appellant herein to the petition in intervention of Walter H. Evans is set forth in the record at pages 31 to 41, inclusive.

Afterwards on the 25th of July, 1913, Messrs. Emmons & Webster filed a demurrer styled a demurrer to answer, but it is not clear to which answer the demurrer was directed and the court below properly disregarded the demurrer, and heard the facts.

(Record, pp. 78 and 79.)

On the 23rd day of March, 1914, following, the court below rendered its opinion (see Record, pp. 43 to 51), wherein it laid the foundation for the order appealed from by directing the receiver to pay the State, County, School and Municipal taxes for the years 1908, 1909, 1910 and 1911, together with the penalty on the

amount of the tax for each year and together with the interest of twelve per cent (12%) accruing between the first Monday in April and the first Monday in May.

Promptly on the 27th of March, 1914, the receiver appellant filed his petition for rehearing found in the record at pages 51 to 73.

On the 23rd day of April, 1914, the court entered the following order:

The court having heretofore, on, to wit: the .... day of ....., 1914, heard the testimony upon the questions raised by the two petitions in intervention of Multnomah County, praying that the receiver herein be required to pay the State, County, School and Municipal taxes assessed against the Title Guarantee & Trust Company on certain personal property for the years 1908 to 1911 inclusive, together with the penalties and interest, and the court having heard the arguments, considered the briefs submitted, rendered its opinion thereon, and overruled a motion for re-hearing herein.

It is hereby ordered and directed, that R. S. Howard, Jr., Receiver herein, pay to the Tax Collector of Multnomah County, on account of the State, County, School and Municipal taxes assessed against the personal property of The Title Guarantee & Trust Company for the year 1908, the sum of $1,304.00 in taxes, and the further sum of $130.40, being 10 per cent penalty on the amount of the above taxes, and $13.04 being interest on the above taxes at 12 per cent from April 5, 1909, to May 5, 1909,

and further that we pay forthwith to the Tax Collector of Multnomah County, on account of the State, County, School and Municipal taxes assessed against the personal property of The Title Guarantee and Trust Company for the year 1909, the sum of $747.00 in taxes, and the further sum of $74.70, being 10 per cent penalty on the amount of the above taxes, and $7.47, being interest on the above taxes at 12 per cent from April 4, 1910, to May 4, 1910, and further, that he pay forthwith to the Tax Collector of Multnomah County, on account of the State, County, School and Municipal taxes assessed against the personal property of The Title Guarantee and Trust Company, for the year 1910, the sum of $913.00 in taxes, and the further sum of $91.30, being 10 per cent penalty on the amount of the above taxes, and $9.13, being interest on the above taxes at 12 per cent from April 3, 1911, to May 3, 1911.

Dated at Portland, Oregon, this 23rd day of April, A. D., 1914.

CHAS. E. WOLVERTON,
Judge.

(See Record, pp. 74 and 75.)

On the 1st day of July, 1914, the appellant presented his petition for appeal and the same was allowed.

(See Record, pp. 166 to 171.)

Notice of appeal bond on appeal, assignment of errors and citation, together with orders relative to the production of testimony and the certification of exhibits were in due course given as more fully appears.

(Record, pp. 171 to 198.)

And accordingly the whole matter comes to this Court for consideration upon the single important and pertinent question presented by this appeal, viz.:

WHETHER UNDER THE LAWS OF THE STATE OF OREGON, PRIOR TO THE AMENDMENT OF 1913, A PERSONAL PROPERTY TAX ASSESSMENT IN THE NAME OF A DEFUNCT CORPORATION THROUGH MERELY PLACING ITS NAME UPON THE TAX ROLL AFTER IT HAD CEASED BUSINESS AND AFTER ALL OF ITS PROPERTY OF EVERY KIND HAD BEEN SURRENDERED TO ITS CREDITORS AND WHILE SAID PROPERTY WAS BEING ADMINISTERED AND DISTRIBUTED THROUGH AND BY A COURT AND RECEIVER, CAN BE MADE AND ENFORCED WITH PENALTIES AND INTEREST AFTER SEVERAL YEARS' DELAY BY AN INTERVENTION IN THE RECEIVERSHIP CAUSE PROSECUTED BY THE AUTHORITIES AS A PREFERRED LIEN OR CLAIM OR BY INDEBITATUS ASSUMPSIT WHEN THE LAWS OF THE STATE AT THE TIME OF INTERVENTION DO NOT PROVIDE FOR SUCH CASES, AND THE SUPREME COURT OF THE STATE HAS EXPRESSLY DENIED SUCH A TAX TO BE EITHER A LIEN OR A DEBT AND DECLARED EQUITY COURTS WITHOUT POWER TO RENDER JUDGMENT THEREFOR?

THE STATUTORY PROVISIONS APPLYING TO THE CASE AT BAR ARE FOUND IN LORD'S OREGON LAWS, VOLUME 2, CHAPTERS III AT PAGE 1411, IV AT PAGE 1415 AND VIII AT PAGE 1459, TO-WIT:

"Section 3551. All real property within this State, "and all personal property situated or owned within "this State, except such as may be specifically exempted "by law, shall be subject to assessment and taxation in "equal and ratable proportion."

"Section 3553. The terms personal estate and per- "sonal property shall be construed to include all things "in action, household furniture, goods, chattels, moneys, "and gold dust, on hand or on deposit; all boats and "vessels, whether at home or abroad, and all capital in- "vested therein; all debts due or to become due from "solvent debtors, whether on account, contract, note, "mortgage, or otherwise, either within or without this "state; all public stocks; all bonds, warrants, and "moneys due or to become due from this state, or any "county or other municipal subdivision thereof; and "stocks and shares in incorporated companies and such "proportion of the capital of incorporated companies "liable to taxation on their capital as shall not be in- "vested in real estate; and all improvements made by "persons on lands claimed by them under the laws of the "United States, the fee of which lands is still vested in "the United States."

"Section 3560. Every person, except as otherwise "provided by law, shall be assessed in the county in "which he resides when the assessment is made for all

"taxable property owned by him, including all personal "estate in his possession, or under his control as trustee, "guardian, executor, or administrator; and where there "are two or more persons jointly in possession, or hav- "ing control of any such property in trust, the same "may be assessed to either or all of such persons, but it "shall be assessed in the county where the same shall "lie if either of such persons resides in such county."

"Section 3563. The personal property of every "private corporation is liable to taxation in the same "manner as the personal property of a natural person, "and shall be assessed in the name of such corporation "in the county where the principal place of business of "such corporation is located, unless otherwise specially "provided by law; but if such corporation is engaged in "the business of navigation, then the steamboats or other "water craft of such corporation shall be assessed in the "county in this state where the home port or berth of such "steamer or other water craft may be. The personal "property of a private corporation may be seized and "sold for any tax levied upon the property of such cor- "poration as in the case of a natural person."

THE METHOD OF THE ENFORCEMENT AND COLLECTION OF DELINQUENT TAXES ON PERSONALTY IS PROVIDED BY THE LAWS OF OREGON EXCLUSIVELY AS FOLLOWS:

"Section 3683. On or immediately after the first "Monday of May in each year the tax collector shall "proceed to collect all taxes levied in his county upon

"personal property, of which one-half was not paid as "hereinbefore provided on or before the first Monday "of April, together with the penalty and interest. He "shall levy upon sufficient goods and chattels, belong- "ing to the person or corporation charged with such "taxes, if the same can be found in the county, by taking "them into his possession, to pay such delinquent taxes, "together with interest, accruing interest, penalties, and "other lawful charges; and shall immediately advertise "such goods and chattels for sale by posting written or "printed notices of the time and place of sale in three "public places in his county not less than ten days prior "to such sale, and if such taxes, interest, and penalties "shall not be paid before the time appointed for such "sale the tax collector shall proceed to sell such property "at public vendue, or so much thereof as shall be suffi- "cient to pay such taxes, interest, and penalties, and "shall deliver to the purchasers thereof at such sale the "property so sold to them respectively, and such sale "shall be absolute; and the tax collector shall proceed "in like manner, on and after the first Monday in No- "vember, to collect the residue of taxes charged against "personal property remaining delinquent on his roll. In "like manner he shall levy upon and sell the goods and "chattels of any person or persons removing from the "county without paying all taxes charged against them. "Whenever after delinquency, in the opinion of the tax "collector, it becomes necessary to charge the tax on "personal property against real property in order that "such personal property tax may be collected, such tax "collector shall select for the purpose some particular

"tract or lots of real property owned by the person "owing such personal property tax, and shall note upon "the tax roll opposite such tract or lots the said tax on "personal property, and said tax shall be a lien on such "real property from and after the time said tax on per- "sonal property is charged against the said real property, "and shall be enforced in the same manner as other real "estate tax liens."

DECISIONS OF THE SUPREME COURT OF THE STATE OF OREGON INTERPRETING THESE LAWS

In *Marion County v. Woodburn Mercantile Co.* (119 Pac. 487, decided December 26, 1911), 60 Oregon at page 367, it is held that

"A tax, not being a debt, so that no promise can be implied as a basis of assumpsit therefor, and a method of collecting taxes on personal property being prescribed by Section 3683, L. O. L., no action for personal taxes will lie if before seizure of the personal property; unless he has real estate against which it can be charged, the county is remediless."

The following decisions interpreting the tax law of the State of Oregon have been made and adhered to, viz:

"That a court of equity is without power to render a money judgment for the amount of personal property taxes."

MULTNOMAH COUNTY v. *PORTLAND CRACKER CO.* (90 Pac. 155, decided May 21, 1907), 49 Oregon 346.

This was a suit to cancel alleged frudulent entries on County records and recover the amount of a tax which purported to be cancelled by such entries, the decree granted all the relief asked and the Supreme Court decided that such a decree could not be sustained for the amount of the tax as the statutes afforded sufficient means of collecting the tax without the intervention of a court of equity for the causes in that case presented.

Likewise and to similar effect are:

Mingyue v. *Coos Bay Railroad,* 21 Ore. 392.

Stemmer v. *Insurance Company,* 33 Ore. 66 (4th syllabus from the top of page).

Denny v. *McCown,* 34 Ore. 48.

But the Supreme Court further said in the case of *Marion County, supra* (60 Oregon at page 369):

"No lein is impressed by our statute upon personal property, and if an owner thereof removes it to another county, or otherwise dispose of it before his goods and chattels are seized for the payment of delinquent taxes levied upon that class of property, and he has no real estate in the county against which such taxes can be made a lien, and no action can be maintained against him to recover the taxes, the county levying them is remediless, and he is not bearing his share of the public burden. No enactment of this State expressly authoizes the bringing of an action in such a case."

SPECIFICATIONS OF ERROR

(Rule 24, Sub. 2 (b)

The specification of the errors relied upon showing as particularly as may be in what respect the decree made is alleged to be erroneous are respectfully submitted as follows:

FIRST SPECIFICATION

That the said District Court of the United States in and for the District of Oregon, Judge Charles E. Wolverton sitting, ***erred in determining and deciding that the laws of the State of Oregon provide for the assessment of personal property taxes against a receivership or property surrendered to the Court in the hands of its receiver.***

SECOND SPECIFICATION

That the said District Court ***erred in determining and deciding that The Title Guarantee & Trust Company still retained a corporate entity for the purpose of winding up its business,*** and in that connection in determining and deciding ***that it was corporate business that the receiver was transacting*** herein ***at the time and during the periods the alleged personal property taxes were said to have been assessed.***

THIRD SPECIFICATION

That the said District Court erred in determining and deciding that all property according to the revenue and taxation laws of the State of Oregon is by

those laws assessable, in so far as the Court applied such a determination and decision to personal property in the hands of said receiver.

FOURTH SPECIFICATION

That the said District Court ***erred*** in determining and ***deciding that the Title Guarantee & Trust Company,*** for the purposes of applying the law in this case, ***was a going concern,*** submitting its property in process of dissolution to the action of the taxing authority, whereas in truth and in fact all of the property of The Title Guarantee & Trust Company was surrendered and the officers thereof had released their control thereto and said matters were of record in said Court in the main cause at the time of the filing of the petitions in intervention and before the assessment of the taxes the basis of the petitions in intervention.

FIFTH SPECIFICATION

That the said District Court ***erred*** in determining and deciding ***that the Title Guarantee & Trust Company,*** through itself and receiver, ***was in possession of property SUBJECT TO TAXATION AS A GOING CONCERN,*** for that the bill of complaint upon which said Court acquired original jurisdiction in said main cause submitted said corporation to the jurisdiction for the purposes and upon the facts as in said bill set forth, for more particular identification of which it is in connection with this assignment of errors set forth fully and at large that the point of law based on this assignment of errors may appear clearly, to-wit:—

SIXTH SPECIFICATION

That the said District Court ***erred in determining*** and deciding ***that The Title Guarantee & Trust Company, through itself as receiver, was in possession of property subject to taxation as a going concern*** for that the appearance and consent filed by the defendant in said main cause submitted said corporation to the jurisdiction of the court for the purposes and upon the facts as in said appearance and consent set forth, for more particular identification of which it is in connection with this assignment of errors set forth fully and at large that the point of law based on this assignment of errors may appear clearly, to-wit:—

SEVENTH SPECIFICATION

That said District Court ***erred*** in determining and deciding ***that the personal property taxes claimed*** for in the petition in intervention ***were assessed against property of a going concern in the hands of a receivership*** and as if previous to the time when the receivership had occurred, ***whereas in truth and in fact this was a proceeding winding up and liquidating all of the property of the corporation, all of the officers of whom had surrendered its corporate entity*** to the Court, together with all of its property, including all of its personal property then being distributed to claimants and distributees whose claims had been duly proved and allowed.

EIGHTH SPECIFICATION

That the said District Court ***erred in determining*** and deciding ***that the personal property assessed was the personal property of the corporation or the receiver because the same was a trust fund for the creditors and claimants of the corporation*** who as claimants and distributees thereof with proved and allowed claims were entitled to the same.

NINTH SPECIFICATION

That the said District Court erred in determining and deciding said alleged personal property tax was recoverable for the reason that ***no business was ever done by the corporation, The Title Guarantee & Trust Company, of any kind or nature whatsoever from and after the 2nd day of November, 1907, long after the alleged assessment of taxes on personalty described in the petitions,*** so that there was no personal property of the corporation to be assessed in the same manner as that of a natural person, nor was there any personal property in the hands of the receiver assessed during said period, there being no such class of property defined in the laws of Oregon for assessment and taxation in that state.

TENTH SPECIFICATION

That the said District Court erred in determining and deciding "but where property remains within the jurisdiction and within the hands of the person taxed there is no impediment to the enforcement of the pay-

ment of the personalty tax assessed against him," and in applying it to this case because ***there was no property in the hands of the person taxed belonging to such person as his or its personal property at the time of the alleged tax and an assessment claimed to have been made either to the receiver or to the corporation under the facts of this case did not support the Court's opinion in that regard.***

ELEVENTH SPECIFICATION

That the said District Court ***erred in determining and deciding***—especially when it found that the taxing officers of the petitioner were early advised that the receiver would resist the payment of taxes assessed against personal property within his hands before any of the taxes in question were levied and also found that the taxes which are sought to have paid were assessed a part of the time in the name of the defunct company alone and a part of the time in the name of the receiver, ***that the same could be claimed by Multnomah County out of personalty distributed to the various creditors and claimants during the process of administration occurring while said property was said to have been so assessed.***

TWELFTH SPECIFICATION

That the said District Court erred in failing and refusing to decide and in disregarding the point submitted to it below, viz:—

"*FOURTH.* That all of the so-called personal property mentioned in the intervening petitions, if assessed to The Title Guarantee & Trust Company, has been and was doubly assessed, for that all of such property was the property of the creditors and claimants who presented their claims to the receiver and had said claims approved and allowed during the times and for amounts which represented the actual conversion of the personal property of The Title Guarantee & Trust Company into liquidated assets which were in turn distributed to said creditors and claimants who in turn paid personal property taxes assessed to each of them individually, and ***hence it is not competent for Multnomah County to claim that during the same time and in respect to the same property other personal property taxes could be assessed against and collected from The Title Guarantee & Trust Company or its estate.***"

THIRTEENTH SPECIFICATION

That the said District Court erred in failing and refusing to decide and in disregarding the point submitted to it below, viz:—

"*FIFTH.* The affairs of The Title Guarantee & Trust Company are not in the nature of an operated concern kept alive by a receivership and administered by the court, but upon the 2nd day of November, 1907, it became insolvent, admitted its insolvency, its officers came into court and

surrendered the company to the court, the court took possession of it, appointed its receiver and there has been no corporate management subsequent to such control, except only for the purpose of a more full and better administration of this court."

FOURTEENTH SPECIFICATION

That the said District Court erred in failing and refusing to decide and in disregarding the point submitted to it below, viz:—

> "But in this case we are not presented with a situation upon either petition of a tax actually attaching to property previous to any possession by the court. The tax for 1907 could not be leviable as a matter of law until after the 1st of January, 1908, and the Board of Equalization did not sit and determine the tax roll assessment until October, 1907, and before the amount of the tax could be computed for the year 1908 all of the property of The Title Guarantee & Trust Company had passed into possession of the court, hence we have not a case presented here which is likened to the cases that ordinarily arise in the matter of imposition of taxes upon going receiverships."

FIFTEENTH SPECIFICATION

That the said District Court ***erred in disregarding and in overlooking and refusing to decide, in conformity with the law of the State of Oregon, that a court of equity is without power to render a***

money judgment for the amount of personal property taxes claimed in the intervening petitions.

SIXTEENTH SPECIFICATION

That the said District Court erred in disregarding the point submitted to it below, viz:—

> "The receiver has all along contended that the petitions in this case were not sufficient to justify a recovery. It nowhere appears that the County of Multnomah exhausted its remedies as against the real estate in the name of or claimed to be held by The Title Guarantee & Trust Company and it is only against real estate or against the personal property itself *in situ* that the delinquency can be enforced by a warrant."

SEVENTEENTH SPECIFICATION

That the opinion and decision of the District Court is directly against and not in conformity with the decisions of the Supreme Court of the United States in the case of United States v. Whitridge, receiver, and United States v. A. H. Jolin, et al., receivers, wherein, on writ of certiorari granted March 10, 1913, 227 U. S. 680, said Supreme Court of the United States affirmed the decision of the Pennsylvania Steel Co. v. New York City in 190 Fed. 777, on or about the 11th of November, 1913, prior to the trial of this intervention, although said opinion was then submitted to said court on the trial below.

EIGHTEENTH SPECIFICATION

That the said District Court erred in disregarding the point submitted to it below, viz:—

"Fifth. Even bankruptcy courts and the statutes relative to administration of estates provide only for taxes *in esse* at the time of the commission of the act of bankruptcy or the death of the testator and taxes afterwards upon personalty are paid not by the bankruptcy estate or the estate of the decedent, but by those into whose hands the property is distributed."

NINETEENTH SPECIFICATION

That the said District Court erred in disregarding the testimony and evidence presented upon the hearing as given by the witness Chief of Field Work in the Assessor's office as follows, to-wit:—

"Q. Did you find out, and refresh your memory about R. S. Howard, Jr., receiver, business?

A. No, I didn't look any further in regard to it, Mr. Bristol.

Q. I will call your attention to intervenor's exhibit 2 and ask you if I understand you correctly that this red shows that the same sort of an arbitrary assessment would be made to The Title Company for 1909?

A. Exactly.

Q. Exactly. So that if you had that statement here it would be just the same as that one?

A. It would be absolutely the same. The red is put on there for the benefit of the Assessor in making comparisons each year.

Q. I am particularly anxious to know whether the name of the receiver would be upon that assessment or that statement at all?

A. Well, that I could not tell you.

Q. Well, it is not on that one, is it?

A. No. That I could not tell you. But the amounts here are taken, these amounts here are taken from the previous.

Q. Yes, I understand that; the previous roll?

A. Yes. But in regard to the name, why, I could not tell you.

Q. Well now, this roll says, 'Title Guarantee & Trust Co.', don't it?

A. Yes.

Q. 'Character of business, banking'?

A. That is the item, the statement there, although the roll might include even more than that.

Q. All right; let's look at it. 6782, line 45, would represent the roll for 1910, wouldn't it?

A. Yes, sir.

Q. That is on Intervenor's Exhibit 2 and is the entry that shows that this statement was entered?

A. Yes, sir, that is it exactly.

Q. I notice on here in blue pencil, 'See Maxwell before entering.' What does that mean?

A. Well, evidently Mr. Maxwell asked something in regard to it. Maybe he wrote it himself. I don't know whether he did or not.

Q. Why was it that Maxwell was always the fellow that was particularly concerned here about this Title Guarantee & Trust Company tax apparently?

A. Well, that I don't know, otherwise than that he was chief deputy in the office. Otherwise I could not tell you.

Q. Now, I show you the 1909 roll at the point and place where line 46 appears, and ask you by what authority anybody would have to enter the name of the Receiver, in view of the fact that you told us this morning on your direct testimony that these entries here were made up from statements previously prepared and that this statement, Intervenor's Exhibit 2, which you say is a proper one, does not show the name R. S. Howard, Jr., Receiver?

A. Well, that would not be any reason why that they could not be added to it, because it is not a tax roll, Mr. Bristol.

Q. Well, but I am getting at the fact that you stated—

A. (Interrupting) It could not be—

Q. (Interrupting) Now, wait a minute. Did I understand you correctly that the foundation for the roll itself is either a previous blank or a previous statement either actually made by the owner or arbitrarily made by the Assessor?

A. Yes, sir.

Q. Is that true?

A. That is true.

Q. Now then, it is also true, isn't it, that Intervenor's Exhibit 2, you told us was the same by reason of these red letters that you identify it by, was the same for 1909 as it was for 1910?

A. Yes, sir. These items—

Q. (Interrupting) Now then, these—

MR. EVANS: (Interrupting) Wait until he gets his answer finished.

MR. BRISTOL: All right. Go ahead.

WITNESS: These items are absolutely the same. (Indicating.) These may not be the same, because if this had changed hands and was under a different name, why, these items would appear, as this was assessment on the particular property.

MR. EVANS: 'This' and 'these' don't get in the record.

Q. (Mr. Bristol) So you did have some information then with regard to the future whether the institution changed hands, did you?

A. Oh, sure.

Q. Now, as a matter of fact, it had changed hands prior to 1909, hadn't it?

A. Yes; part of it was changed hands anyway, before that.

Q. No, but I am getting at the actual physical situation as to the Title Guarantee & Trust Company. Did not you as one of the Assessor's deputies, know that the Title Guarantee & Trust Company went into the hands of this court on November 2nd, 1907?

A. There is no doubt but what the Assessor knew it.

Q. Yes; all the time?

A. There is not any argument about that.

Q. Well, I don't know whether there is or not. What is the fact? You people representing Multnomah County knew that, didn't you? It was published in the papers and everywhere else?

A. There is no doubt about it.

Q. No. Now, what I think is particular material to us is that if the Receiver on the one hand was con-

stantly contending, or making it appear, that there was no liability, and the Assessor was making it appear that there was a liability, and that arbitrary assessments were made in this way all the time to get a foundation for the rolls, how it came about that when we got the arbitrary assessment statement produced, the Receiver's name is not on it, if there was an intention to assess the Receiver.

A. That does not make any difference, because this is not a roll.

Q. Which is not a roll?

A. This not the roll until after it is accepted as a roll. You see, this is simply the foundation of the tax roll. At the time that the Assessor makes this up, now—

Q. (Interrupting) What you are referring to as 'this,' is book 6708 of 1909 tax?

A. Yes; any book, as far as that is concerned, that is included in the roll. I am making a general statement that so far as the Assessor was concerned, if the day before he turned this over to the Board of Equalization he had got information that these safety deposit vaults were only worth five hundred dollars he had a perfect right to change this to five hundred dollars. That is not violating any part of the law. And if he found R. S. Howard, Jr., was an owner of a part of it the day before he turned it over, he had a right to add R. S. Haward, Jr's. name so long as he notifies him.

A. Yes.

Q. Have you got any proof that he ever notified him?

A. Yes.

Q. What?

A. The record shows, you know, the date of the notification, and that is the only person that he could notify.

Q. Where is the record of notification in 1909 that you notified the Receiver?

A. We haven't got it here.

Q. You haven't got it here. Did you notify the Receiver?

A. I always do.

Q. Not the Title Guarantee & Trust Company, but the Receiver.

A. Always do, because the Assessor knew—there is no doubt but what he knew The Title Guarantee & Trust Company was in the hands of a Receiver and that R. S. Howard, Jr., was the Receiver.

Q. Now, Mr. Funk, just a minute. I don't want you to make a statement that might be incorrect.

A. I don't want to, either.

Q. I know, but listen. Now let me remind you: You remember that George H. Hill was the first Receiver in this court, don't you, and that he was removed?

A. Yes, I remember he was, yes.

Q. And you remember that next to George H. Hill came Edward C. Mears, who would be the receiver in the year that this assessment was made, 1909.

A. Well then, probably Mr. Mears is the man that—

Q. (Interrupting) Well then, how does it come that R. S. Howard's name is put there? That is just what I want to know.

A. Well, if Mr. Mears was the receiver at the time that this roll was turned over to the Board of Equalization, I haven't any explanation.

Q. Yes. Well now, the roll for 1909 taxes—let's get it right now—the roll for 1909 taxes would be in the Board of Equalization in October of 1908, wouldn't it?

A. Yes, October of 1908.

Q. Wouldn't it?

A. No; October of 1909.

Q. Not the 1909 roll; that would be the ten roll.

A. The 1909 roll is 1909.

Q. The 1909 roll is 1909?

A. Yes.

Q. In other words, then, if that be the case, there is twelve months yet in our favor that I didn't know about. The roll for this year of 1913, for instance, we went before the Board as taxpayers in October, 1913?

A. That is correct.

Q. Now, that roll you don't collect on until after the 1st of March, 1914?

A. Yes.

Q. Is that right?

A. The 1st of February.

Q. The 1st of February, yes. Now then, this 1909 roll then would not be subject to collection upon it until the following 1st of February, 1910?

A. That is correct."

TWENTIETH SPECIFICATION

That the said District Court erred in disregarding the evidence and in failing and refusing to find upon ***the evidence and the concession made by the intervening petitioner, Multnomah County, upon the trial; the evidence and the concession that the only time and the first time that R. S. Howard, Jr., receiver, was ever assessed was upon roll page 6119, line 12, for 1913, the present roll, pages of the record 79, 80 and 81, and the evidence does not disclose and there was not any evidence tending to show or prove that any assessment was made against the property of The Title Guarantee & Trust Company or its receiver as a going concern or otherwise than as shown on said rolls in the name of The Title Guarantee & Trust Company as if it were a going concern.***

TWENTY-FIRST SPECIFICATION

That the said District Court ***erred in determining*** and deciding ***that Multnomah County, intervening petitioner, could recover penalties and in adjudging and ordering any penalties to be paid upon any of the alleged personal property taxes.***

TWENTY-SECOND SPECIFICATION

That the said District Court erred in determining and deciding in favor of the intervening petitioner, Multnomah County, and against R. S. Howard, Jr., receiver, as follows, to-wit:—

"IT IS HEREBY ORDERED AND DIRECTED, that R. S. Howard, Jr., Receiver herein, pay to the TAX COLLECTOR of Multnomah County, on account of the State, County, School, and Municipal taxes ***assessed against the personal property of The Title Guarantee & Trust Company for the year 1908,*** the sum of $1,304.00 in taxes, and the further sum of $130.40, being 10 per cent penalty on the amount of the above taxes, and $13.04 being interest on the above taxes at 12% from April 5, 1909 to May 5, 1909, and further that he pay forthwith to the Tax Collector of Multnomah County, on account of the State, County, School, and Municipal taxes ***assessed against the personal property of The Title Guarantee & Trust Company for the year 1909,*** the sum of $747 in taxes, and the further sum of $74.70, being 10% penalty on the amount of the above taxes, and $7.47, being interest on the above taxes at 12% from April 4, 1910, to May 4, 1910, and further, that he pay forthwith to the Tax Collector of Multnomah County, on account of the State, County, School and Municipal taxes ***assessed against the personal property of The Title Guarantee & Trust Company, for the year 1910,*** the sum of $913.00 in taxes, and the further sum of $91.30, being 10 per cent penalty on the amount of the above taxes, and $9.13, being interest on the above taxes at 12% from April 3, 1911 to May 3, 1911.

Dated at Portland, Oregon, this 23rd day of April, A. D., 1914."

TWENTY-THIRD SPECIFICATION

That the findings and decree of said District Court are against the law and the equity of the case as presented by the intervening petitions and the answers thereto.

BRIEF OF THE ARGUMENT

(RULE 24, SUB. 2 (c).)

Points of Law and Fact Discussed.

THE MAIN OBJECT AND PURPOSE OF THE COY LITIGATION IS A WINDING UP AND LIQUIDATION SUIT AND THE CORPORATION IS AND WAS NOT BEING RUN BY ITS OFFICERS OR MAINTAINED AS A CORPORATION, BUT ON THE CONTRARY SURRENDERED ITS CORPORATE ENTITY TO THE COURT, AND ALL OF ITS PROPERTY, AND PARTICULARLY ALL OF IS PERSONAL PROPERTY, IS AND WAS BEING DISTRIBUTED, SO THAT THERE WAS NO PERSONAL PROPERTY OF THE CORPORATION TO BE ASSESSED IN THE SAME MANNER AS THAT OF A NATURAL PERSON, NOR WAS THERE ANY PERSONAL PROPERTY IN THE HANDS OF THE RECEIVER ASSESSED DURING SAID PERIOD, THERE BEING NO SUCH CLASS OF PROPERTY DEFINED IN THE LAW FOR ASSESSMENT AND TAXATION IN OREGON.

IN THIS CASE WE ARE NOT PRESENTED WITH A SITUATION UPON EITHER PETITION OF A TAX

ACTUALLY ATTACHING TO PROPERTY PREVIOUS TO ANY POSSESSION BY THE COURT. THE TAX FOR 1907 COULD NOT BE LEVIABLE AS A MATTER OF LAW UNTIL AFTER THE 1ST OF JANUARY, 1908, AND THE BOARD OF EQUALIZATION DID NOT SIT AND DETERMINE THE TAX ROLL ASSESSMENT UNTIL OCTOBER, 1907, AND BEFORE THE AMOUNT OF THE TAX COULD BE COMPUTED FOR THE YEAR 1908 ALL OF THE PROPERTY OF THE TITLE GUARANTEE & TRUST COMPANY HAD PASSED INTO POSSESSION OF THE COURT, HENCE WE HAVE NOT A CASE PRESENTED HERE WHICH IS LIKENED TO THE CASES THAT ORDINARILY ARISE IN THE MATTER OF IMPOSITION OF TAXES UPON GOING RECEIVERSHIPS.

And these considerations were promptly moved before and presented to the Court below.

(Record, pp. 69-70; 54 and 55.)

THE RECEIVER HAS ALL ALONG CONTENDED THAT THE PETITIONS IN THIS CASE WERE NOT SUFFICIENT TO JUSTIFY A RECOVERY. IT NOWHERE APPEARS THAT THE COUNTY OF MULTNOMAH EXHAUSTED ITS REMEDIES AS AGAINST THE REAL ESTATE IN THE NAME OF OR CLAIMED TO BE HELD BY THE TITLE GUARANTEE & TRUST COMPANY AND IT IS ONLY AGAINST REAL ESTATE OR AGAINST THE PERSONAL PROPERTY ITSELF IN SUIT THAT THE

DELINQUENCY CAN BE ENFORCED BY A WARRANT.

(Record, pp. 17, 19 and 58, and 31 to 33 *et seq.*)

(Record, Motion to Dismiss, page 163.)

And the receiver-appellant has likewise always contended that the opinion and findings of the Court were against the law, against the evidence and against the equity of the case.

(Record, pp. 88, 191; and pp. 23 and 40.)

Section 3683, Lord's Oregon Laws, Chapter VIII, page 1459, Volume II, exclusively provides the only method for the enforcement of delinquent personal property taxes, and it is quite clear that a *lien does not arise until full compliance with that section.*

It is the law of Oregon, as interpreted, that a personal property tax is not a debt; that *assumpsit* will not lie therefor and that there is no lien for any of the items involved in the case at bar.

As matter of law (Section 3553 L. O. L., *ante*), the item for the years 1908, 1909 to 1911, purporting to consist of *"safe deposit vaults"* are not among the properties mentioned by the statute that can be regarded as personalty, because not so defined.

Moreover, on the 6th day of November, 1907, The Title Guarantee & Trust Company surrendered all of its property for the benefit of all its creditors and upon the accomplishment of that act and the court's possession ***the personalty there and then became immediately the property of the creditors of the cor-***

poration and there could be no personalty belonging to The Title Guarantee & Trust Co. until after liquidation of all of the property it should appear that there was an overplus over the amount of all of its debts properly taxable as personalty to that company; AND THESE FACTS WERE NOT PROVED OR SHOWN BY THE INTERVENORS AND THERE IS A TOTAL FAILURE OF PROOF THEREABOUT.

Considering for a moment the testimony offered by the petitioners in connection with the specifications of error (face page 81), the first assessment for 1908 was merchandise and stock in trade, $62,500.00.

Obviously The Title Guarantee & Trust Company, being a banking corporation, had no merchandise or stock in trade.

Likewise for the year 1909 (record, page 84) merchandise and stock in trade, $40,000.00; to this the same criticism would apply.

The same is equally true of the year 1910 (record, page 86), and observe that the witness distinctively says (record, page 87) that the roll shows that the character of the business is banking (top of page 87) and obviously merchandise and stock in trade would not fit such a situation.

However, when we come to the assessment for 1911 (record top of page 88), we find the character of the business stated to be *safe deposit vaults* and the same

relative terminology for assessment *merchandise and stock in trade.*

It will be noted that in the trial of the cause (and upon this the specifications of error are most specific, record, page 178, assignments 9, 10, 11, 12 and 19 at page 182 and 20 at page 189), there was an objection to the conduct of the case and a ruling by the Court as to the application of the words *"merchandise and stock in trade"* (record, page 88) and the Court below took a hand in the examination and inquired as follows:

"The Court: That does not include money, notes and accounts?

A. *There is no item in this particular assessment under that heading.*

The Court: *Well I say merchandise and stock in trade does not include money, notes and accounts?*

A. *No."*

(Record, page 89.)

The intervening petitioners offer no evidence to correct this anomaly; on the contrary, their own witness, on cross-examination, enlarged its application (record, pages 92, 93 and 94) until the Court again took a hand.

(Record, page 96.)

"The Court: Suppose it should turn out that The Title Guarantee & Trust Company were possessed of no merchandise and stock in trade, do you think The Title Guarantee & Trust Company should apply to the Sheriff for correction?

A. Yes, at that time.

Mr. Bristol: And suppose The Title Guarantee & Trust Company at that time was not doing business, had no actual entity in the sense of having a corporation or anything of the kind that was active through its officers and was itself a dead thing, then what?

A. *It is a point that is difficult for me to answer because I have not gone into it thoroughly; the fact of the matter is we have several cases pending.*"

In connection with this testimony one of the important witnesses, the chief of the field work in the County Assessor's office of Multnomah County for over nine years, testified among other things relative to this matter as follows:

"Q. Did you find out, and refresh your memory about R. S. Howard, Jr., Receiver, business?

A. NO, I DIDN'T LOOK ANY FURTHER IN REGARD TO IT, MR. BRISTOL.

Q. I WILL CALL YOUR ATTENTION TO INTERVENOR'S EXHIBIT 2 AND ASK YOU IF I UNDERSTAND YOU CORRECTLY THAT THIS RED SHOWS THAT THE SAME SORT OF AN ARBITRARY ASSESSMENT WOULD BE MADE TO THE TITLE COMPANY FOR 1909?

A. EXACTLY.

Q. Exactly. So that if you had that statement here it would be just the same as that one?

A. IT WOULD BE ABSOLUTELY THE SAME. THE RED IS PUT ON THERE FOR THE BENEFIT OF THE ASSESSOR IN MAKING COMPARISONS EACH YEAR.

Q. I AM PARTICULARLY ANXIOUS TO KNOW WHETHER THE NAME OF THE RECEIVER WOULD BE UPON THAT ASSESSMENT OR THAT STATEMENT AT ALL?

A. WELL, THAT I COULD NOT TELL YOU.

(Record, page 118.)

Q. No, but I am getting at the actual physical situation as to the Title Guarantee & Trust Company. Did not you as one of the Assessor's deputies, know that the Title Guarantee & Trust Company went into the hands of this court on November 2nd, 1907?

A. There is no doubt but what the Assessor knew it.

Q. Yes; all the time?

A. There is not any argument about that.

Q. Well, I don't know whether there is or not. What is the fact? You people representing Multnomah County knew that, didn't you? It was published in the papers and everywhere else?

A. There is no doubt about it.

Q. No. Now, what I think is particular material to us is that if the Receiver on the one hand was constantly contending, or making it appear, that there was no liability, and the Assessor was making it appear that there was a liability, and that arbitrary assessments were made in this way all the time to get a foundation for the rolls, how it came about that when we got the arbitrary assessment statement produced, the Receiver's name is not on it, if there was an intention to assess the Receiver.

A. That does not make any difference, because this is not a roll.

(Record, page 121.)

Q. Which is not a roll?

A. This not the roll until after it is accepted as a roll. You see, this is simply the foundation of the tax roll. At the time that the Assessor marked this up, now—

Q. (Interrupting) What you are referring to as 'this', is book 6708 of 1909 tax?

A. Yes; any book, as far as that is concerned, that is included in the roll. I am making a general statement that so far as the Assessor was concerned, if the day before he turned this over to the Board of Equalization he had got information that these safety deposit vaults were only worth five hundred dollars he had a perfect right to change this to five hundred dollars. That is not violating any part of the law. And if he found R. S. Howard, Jr., was an owner of a part of it the day before he turned it over, he had a right to add R. S. Howard, Jr's. name so long as he notifies him.

Q. So long as he notifies him?

A. Yes.

(Record, page 122.)

Q. Not the Title Guarantee & Trust Company, but the Receiver.

A. ALWAYS DO, BECAUSE THE ASSESSOR KNEW—THERE IS NO DOUBT BUT WHAT HE KNEW THE TITLE GUARAN-

TEE & TRUST COMPANY WAS IN THE HANDS OF A RECEIVER AND THAT R. S. HOWARD, JR., WAS THE RECEIVER.

Q. NOW, MR. FUNK, JUST A MINUTE. I DON'T WANT YOU TO MAKE A STATEMENT THAT MIGHT BE INCORRECT.

A. I DON'T WANT TO, EITHER.

Q. I KNOW, BUT LISTEN. NOW LET ME REMIND YOU: YOU REMEMBER THAT GEORGE H. HILL WAS THE FIRST RECEIVER IN THIS COURT, DON'T YOU, AND THAT HE WAS REMOVED?

A. YES, I REMEMBER HE WAS, YES.

Q. AND YOU REMEMBER THAT NEXT TO GEORGE H. HILL CAME EDWARD C. MEARS, WHO WOULD BE THE RECEIVER IN THE YEAR THAT THIS ASSESSMENT WAS MADE, 1909.

A. Well then, probably Mr. Mears is the man that—

Q. (Interrupting) Well then, how does it come that R. S. Howard's name is put there? That is just what I want to know.

A. WELL, IF MR. MEARS WAS THE RECEIVER AT THE TIME THAT THIS ROLL WAS TURNED OVER TO THE BOARD OF EQUALIZATION, I HAVEN'T ANY EXPLANATION.

Q. Yes. Well now, the roll for 1909 taxes—let's get it right now—the roll for 1909 taxes would be in

the Board of Equalization in October of 1908, wouldn't it?

(Record, page 123.)

A. Yes, October of 1908.

Q. Wouldn't it?

A. No; October of 1909.

Q. Not in 1909 roll; that would be the ten roll.

A. The 1909 roll is 1909.

Q. The 1909 roll is 1909?

A. Yes.

Q. IN OTHER WORDS, THEN, IF THAT BE THE CASE, THERE IS TWELVE MONTHS YET IN OUR FAVOR THAT I DIDN'T KNOW ABOUT. THE ROLL FOR THIS YEAR OF 1913, FOR INSTANCE, WE WENT BEFORE THE BOARD AS TAXPAYERS IN OCTOBER, 1913?

A. That is correct.

Q. Now, that roll you don't collect on until after the 1st of March, 1914?

A. Yes.

(Record, page 124.)

It is important to note that among other things determined by its opinion below, the Court in writing its considerations said:

"A receiver was appointed for The Title Guarantee and Trust Company by this court on November 6, 1907, and the taxes which it is sought to have paid were assessed against the company a part of the time in its name alone, and a part of the time in the name of the company, R. S. Howard, Jr., Receiver.

Now, in the case at bar the taxing officers were early advised that the receiver would resist the payment of taxes assessed against personal property within his hands. This before any of the taxes in question were levied. While it may be the duty of the receiver to pay the taxes legitimately due, or to apply to the court for authority to do so, yet when a question has arisen touching the validity of the tax, and the taxing officers are advised of that fact, the duty is all the more incumbent upon the tax collector to proceed promptly in the proper way to require the payment of such tax."

(Record, pp. 43 and 49.)

The notification and advice to the officers was not controverted, and was specific and complete, before assessment made.

(Record, p. 147.)

(Record, pp. 140, 143, 148, 154, 157, 158.)

Furthermore the only instance of assessment to or in the name of the receiver was the tax roll of 1913; and no evidence was offered to show any such assessment within the time of the petitions.

(Record, p. 161.)

And this point was conceded by the counsel for the intervenors upon the trial.

(Record, pp. 161 and 162.)

Applying these facts to the case, it follows that under the *Evans'* petition in intervention there could not in law be a valid decree for recovery in debt; and under the *Emmons* & *Webster* petition there could be no re-

covery as for a lien or preferred claim; and certainly, this is true, when the Supreme Court of the State has held *as a rule of property* that the provisional tax collection remedy of section 3683 (*ante,* this brief, p. 9) is exclusive.

It is against the law, moreover, to allow any penalty or any interest.

County Comrs. v. *Clarke & Berry,* 36 Md. 206.
Blakistone v. *State,* 117 Maryland 237.

But, although the Court below recognized this rule of law it did not completely apply it (record, pp. 50 and 51) for its order was for "*penalty of ten per cent on amount of the tax for each year, and the interest of 12 per cent accrueing between the first Monday in April and the first Monday in May.*" (Record, page 51.) (Record, pp. 74-75.) And this action of the Court is assigned error. (Record, page 189, foot of page.)

The laws of Oregon contain no provision as to receiver; indeed the theory and intent of the law seems plainly to be that the distributees and creditors ARE THE PERSONS LOGICALLY AFFECTED BY THE TAX. At any rate the law does provide an exclusive method of collection; and this appellant-receiver was and is not doing business for the taxing authorities, but for the creditors.

Penn. Steel Co. v. *New York City Ry.,* 176 Federal 477.
Gay v. *Hudson River Elec. Power Co.,* 190 Federal 777.

Further judicial utterance applying to the Oregon system of revenue by taxation arises in a case from Lane County, viz:

Lane County vs. Oregon, 7 Wall. (74 U. S. 71; 19 L. Ed. 101).

wherein it was distinctly held by the SUPREME COURT OF THE UNITED STATES that a tax under the laws of Oregon was not a debt and that the assessment of taxes did not create a debt that could be enforced by a suit or upon which a promise to pay interest could be implied.

This principle was adopted by Chief Justice Chase and is adopted by the State Supreme Court in the Marion County case, supra. It is familiar law and has been decided many times, both in and out of Oregon, that where a statutory remedy is provided it must be followed, and that neither an action at law or a suit in equity can be maintained under such circumstances.

Phipps v. Kelly, 12 Ore. 213;
Mingyue v. Coos Bay Railroad, *supra;*
Pierce County v. Merrill, 19 Wash. 175,

is a direct holding by our sister state upon this proposition.

The language used in the Oregon statutes, *supra,* does not fairly or unequivocally or at all indicate any intent to tax personal property of a corporation that

has passed into the control of its creditors through proceedings in Court taking over such property to be marshaled and distributed.

Pennsylvania v. *New York,* 193 Fed. 287.

The statutes can not be enlarged to cover cases not clearly within their import.

Pennsylvania Steel Co. v. *New York City Ry. Co.,* (C. Ca. Second Circuit) 198 Fed. 774, p. 775.

The Title Guarantee & Trust Company on November 6, 1907. ***lost for the time being all dominion over its property, had and possessed no property, either personal or real, as a natural person. Whatever function of ownership ever existed as to personal property ceased November 6, 1907; and therefore an assessment of personalty to it was not against the receivership.***

Pennsylvania Steel Co. v. *New York City Ry. Co.,* 198 Fed. 777.

The Supreme Court of the United States affirmed these conclusions, and denied the right of the federal authorities to proceed for excise taxes against receivers in a similar and analagous proceeding.

United States v. *Whitridge,* 231 U. S. 144. U. S. Sup. Ct. Adv., op. No. 2, Dec. 15, 1913, at pages 24 and 25.

United States v. *Joline,* S. C.

The facts in this case were:

"In the year 1911, petitions were filed in the Circuit "Court in behalf of the United States praying for orders "directing the receivers to make returns of the net in- "come of the respective railway corporations for the "years 1909 and 1910, to the collector of internal rev- "enue, in the manner required by the provisions of the "corporation tax law (Act of August 5, 1909, sec. 38; "36 Stat. ch. 6, pp. 11, 112-117.)

"The applications were resisted by the receivers on "the ground that the respective corporations did not dur- "ing the years 1909 and 1910 carry on any business "in respect of the property that was in their hands as "such receivers; *that they as such receivers managed, "controlled and operated the same, and carried on all "the business in respect thereto, and received all the in- "come arising therefrom, not acting in place of the direc- "tors and officers of the respective companies, but as "officers of the court; and that they were therefore not "subject to the provisions of the act."*

(Italics mine.)

Upon this subject matter, Mr. Justice Pitney, writing for the court, gave the opinion:

"And we are unable to perceive that such receivers "are within the spirit and purpose of the act, any more "than they are within its letter. True, they may hold, "for the time, all the franchises and property of the cor- "poration, excepting its primary franchise of corporate "existence. ***In the present cases, the receivers "were authorized and required to manage and "operate the railroads and to discharge the***

"public obligations of the corporations is this "behalf. But they did this as officers of the "court, and subject to the orders of the court; "not as officers of the respective corporations, "nor with the advantages that inhere in corpor- "ate organization as such. The possession and "control of the receivers constituted, on the "contrary, an ouster of corporate management "and control, with the accompanying advan- "tages and privileges.

"Without amplifying the discussion, we content our- "selves with saying that, having regard to the genesis "of the legislation, the constitutional limitation in view "of which it was evidently framed, the language em- "ployed by the lawmaker, and the reason and spirit of "the enactment, all considerations alike lead to the con- "clusion that the act of 1909 did not impose a tax upon "the income derived from the management of corporate "property by receivers, under such conditions as are here "presented. *Decrees affirmed."*

(Italics mine.)

United States vs. Whitridge, *supra.*

It hardly seems possible to present a stronger analogy than this for authority against the action of the court below. And the assignments of error, and the specifications thereof herein expressly and specifically raise these points.

(Record, pp. 181, 182 and 191.)

It remains to say, only, that the court below seemed to rather adhere to the view that revenue for the state

must be met, because The Title Guarantee & Trust Company was held by the court's receiver, *its entity separately regarded,* "subject to all the burdens and limi-"tations to which the corporation itself was subject un-"der the law, and one of these is the liability to taxa-"tion as a natural person. I am clear that a receivership "does not withdraw the corporation from that liability." (Record, p. 45.)

These considerations do not answer our question, however. *No one disputes the corporation's liability.* The Supreme Court in the *Whitridge case, supra,* clearly recognizes it. The Oregon Supreme Court, however, compels the procedure to be in accordance with statute. This record discloses an intervention in an equity case. Liability of the corporation for taxes, after its property has passed to its creditors, has to be determined against property belonging to it, and its property only, and satisfied out of that property only, ***and cannot either in law or equity be satisfied out of property belonging to its creditors and being, when the alleged assessment is made, distributed to such creditors. Indeed at the time the petitions in intervention were filed the property assessed as "SAFE DEPOSIT VAULTS" had been sold and the proceeds distributed in dividends*** (Record p. 131). ***The presumptions to be indisputably indulged, therefore, are that the requirements for state revenue were met by taxation of personalty paid by the several creditors as the property actually attempted to be assessed was in and constantly and continually***

being placed in their hands, as distribution upon liquidation progressed.

The receiver appellant is in an attitude so strongly defined, *supra,* by Mr. Justice Pitney in the *Whitridge case.* He is not an officer of the corporation. His possession is and was ***"an ouster of corporate management and control."***

How can a valid judgment order or decree, then, in view of these considerations, be entered against the receiver? The corporation's liability is confessedly its personal liability. The assessment in the same manner *"as a natural person"* depends upon possession. The liability is strictly personal to the owner of the personal property assessed. The statute so states. *How then can it be said that the court's decree is right, for upon interventions in equity without any conformity to the exclusive statutory proceeding specified, an interlocutory decree is entered against the funds of the creditors in the hands of its receiver appellant?* Nevertheless, it was done.

(Record, pp. 74 and 75.)

The intervenors took their real property taxes during all this period from 1907 to 1911 without once assessing the receiver, or applying to the court to reach their present end until five years after the court took possession; but the tax on realty is a lien. The tax on personalty is neither a debt nor a lien, until steps provided by statute fructify into an enforcible demand. The intervenors took no such steps. The officers assessing never once assessed the receiver appellant, for personalty tax.

How is it equitable or right to take now from the funds of the creditors, *"as upon a preferred lien or claim"* when no lien is given, or upon *assumpsit* when no debt exists, personal property taxes in favor of intervenors appellees together with penalty and interest? Nevertheless, it was done.

(Record, pp. 74 and 75.)

Or, these things are about to be done if the decree is sustained, and enforced.

This decree, however, says each assessment claimed for is *"against the personal property of The Title Guarantee and Trust Company."* (See Record, pp. 74 and 75.)

What becomes, therefore, of the preferred lien or claim (Record, pp. 13 and 14) ***of the EMMONS & WEBSTER PETITION as against creditors?***

The decree is not in conformity with those alleged facts.

What becomes, therefore, of the ASSUMPSIT demand of the Evans petition (Record, pp. 24 and 25) ***which in truth is laid against The Title Guarantee & Trust Co., not the receiver?***

The decree is not in conformity with these facts because it orders and directs the receiver-appellant to pay the tax collector out of the funds of the preferred and general creditors, whose claims previously attached.

Besides this, the remedy at law was always available.

Consequently the decree is against the law and equity of the case, and it is respectfully submitted that error lies in the respects assigned and specified, and the receiver appellant, as to the direction and order upon him to pay the said taxes so claimed, should be exonerated therefrom, and the said decree reversed, so that creditors and claimants may not be prejudiced and full equity be done.

If the court thinks the intervening petitioners are nevertheless entitled to their demands, though without conformity to statute, then they should be postponed until the final dismissal of the main case and discharge of receiver appellant with leave or direction then only to enforce their alleged demand against surplus funds if any actually remaining the property of The Title Guarantee & Trust Company, as upon proof and submitted evidence may then be established.

The decree is clearly by virtue of the assumption that after 1907 the Title Guarantee & Trust Company was possessed of property taxable as personalty the same as a natural person; but it conclusively appears it had none such; indeed, nothing but its empty corporate name, against which intervenors are claiming the right to proceed, **but in the name of the receiver, and obtain satisfaction out of creditors' funds in his hands yet to be realized or distributed. The Supreme Court of the United States would not allow the Federal Government to do so; then, why should this Court permit it to be done in this case,**

where the laws of the State designate a special procedure, and the highest court of the state denies such a right to litigants in its own court.

Respectfully submitted,
WILLIAM C. BRISTOL,
Attorney for Appellant.

September 5th, 1914.